



# REPORT on

## CONFERENCE ON INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY UNDER THE 2003 CONVENTION

Seeking a Collaborative Interface between ICH and IP

***New Delhi, India • 23 – 28 March 2007  
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2006 Programme for Professionals in the Fields of UNESCO's Competence



**ACCU International Exchange Program under the  
UNESCO/Japan Funds-in-Trust for the Promotion of International  
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In Cooperation with:



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## Programme Information:

### Introduction

The Asia/Pacific Cultural Centre for UNESCO (ACCU), in close cooperation with Kyushu University of Fukuoka, Japan and the Council for Scientific and Industrial Research (CSIR) of India, organized the **Conference on Intangible Cultural Heritage and Intellectual Property Under the 2003 Convention** held at the Maidens Hotel in New Delhi, India, from 23-28 March 2007. This conference is one of the 2006 Programme for Professionals in the Fields of UNESCO's Competence within the framework of the ACCU International Exchange Programme under the UNESCO/Japan Funds-in-Trust for the Promotion of International Cooperation and Mutual Understanding.

Speakers and participants from seven (7) countries participated in the conference. The participating countries are Switzerland, Japan, Canada, India, Brazil, the Netherlands and the United Kingdom.

### Objective / Purpose

Article 3(b) of the Convention for the Safeguarding of the Intangible Cultural Heritage in 2003 ("2003 Convention") explicitly states that it cannot be interpreted as "affecting the rights and obligations of State Parties deriving from any other international instrument relating to intellectual property rights ... to which they are parties."

On the other hand, the said Convention requires its States-Parties to establish one or more inventories of ICH. One of the purposes of inventory-making is to allow the States-Parties to discover and enumerate what they have as ICH in their respective territories.

Inventories, in general, have an important impact on intellectual property. They provide evidence of prior art. The patentability of TK will become more difficult for those who are not their true owners or holders, while intellectual property protection for genuine practitioners of Traditional Cultural Expressions ("TCE") will be attainable. Of course, it is still an continuing debate as to how intellectual property will or can interface with intangible cultural heritage. This is one of greater challenges facing the world today, whether viewed from the North and South dichotomy, the conflict between the developed and developing worlds, or from the perspective of the gene-poor but technologically-rich countries versus gene-rich but technologically-disadvantaged nations.

From this global debate, certain questions can be raised, *inter alia*:

- 1) How should inventories under the 2003 Convention be generated? Should it be different from any database for IP protection?
- 2) Would/Should such inventories have IP-related impact? What would be the relationship between these inventories and Article 3 (b)?

- 3) Would such inventories with IP-related impact serve the purpose of safeguarding ICH or would they be rather harmful, such as spoiling community efforts or fostering disputes in the community? Put in another way, does IP protection truly help the local communities in that it will assist in the perpetuation of TK or will it ultimately result in the communities' abandonment of their traditional ways? In this regard, is there a friction between IP protection and ICH safeguarding?
- 4) By requiring the establishment of inventories without ensuring that these inventories have to be accessed, or how they can be accessed, is the 2003 Convention a tool for further biopiracy or misappropriation?
- 5) Moreover, as nothing has been said as to who will be the intellectual property holder of the TK or TCE in the inventory, will it be the Member State which generates the inventory that shall be the holder? Or the group or community that has practiced the TK or TCE? And how will the equitable sharing of the benefits happen if nothing is specified in relation to the ownership of the TK or TCE?

The Conference is expected to shed light to the solutions to these questions.

New Delhi, India, was the venue of the Conference. As is very well known, India has a long history of traditional knowledge. It has a wealth of indigenous knowledge, and highly evolved and sophisticated technologies. India is currently developing its Traditional Knowledge Digital Library (TKDL) as part of its national inventories.

This Conference was a venue whereby IP and ICH experts exchanged thoughts on IP, TK and TCE vis-à-vis the 2003 Convention. In addition, as far as India's TKDL is concerned, this conference allowed the speakers and all participants to learn from its experiences, both on how to design these inventories and what have been their legal issues or struggles in relation to its development.

The conference aims, as its end goals, for the following:

- ***If the speakers unanimously agree***, the drafting of a Conference Resolution or Recommendation that shall embody the critical parameters as to how Intellectual Property can or may adequately interface and protect Intangible Cultural Heritage (the speakers during the conference decided not to draft resolutions or recommendations);
- ***Publication in a book*** and uploading of the finalized Conference Papers of the noted speakers to contribute to an enhanced global awareness of these important issues and questions; and
- ***Contribute to on-going efforts in the generation of the 2003 Convention-sanctioned national inventories*** by learning from the experiences and challenges of the host country, India.

It is envisioned that the speakers and all the participants will return to their countries or areas of origin with a renewed enthusiasm to tackle these pending issues and questions.

## Programme Proper:

### I. INTRODUCTION TO THE CONFERENCE

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“The 2003 Convention should not be seen as a panacea or simply a remedial measure to the leaning of the 1972 Convention towards tangible or material heritage. To a certain extent, it was crafted to address the inadequacies of the 1972 Convention. However, it should further be viewed as a complementary international document that cements the importance of the intangible aspect of heritage in international consciousness, and a manifestation of escalating global support ... It presents itself as a viable document for the protection of the culture of mankind. It steers attention away from mere monumental or material heritage to those which are intangible, invisible, spiritual. It emphasizes on the plight of the indigenous peoples – populations of long-neglected persons who have endured eons of colonization and cultural destructions, as well as on communities and groups who have fervently practiced ICH.”

**Toshiyuki Kono**, “*Practice Under the 2003 Convention: Unresolved Issues, Unanswered Questions*” presented during the conference

#### *The 1972 Convention*

In 1972, UNESCO adopted the Convention concerning the Protection of the World Cultural and Natural Heritage (“1972 Convention”). This Convention was crafted because of the destruction, or unabated threat of destruction, of cultural and natural heritage due to changes in economic and social conditions apart from natural decay. The disappearance of these cultural wonders constitute “a harmful impoverishment of the heritage of all the nations of the world” and “therefore (the) need to be preserved as part of the world heritage of mankind as a whole”(Preambular clauses, *Convention concerning the Protection of the World Cultural and Natural Heritage* [1972]). The 1972 Convention, specifically Article 8, established the World Heritage Committee, the body overseeing the accomplishment of goals stated in the text. It also enshrined the World Heritage List through Article 11.1 which is a list of properties that forms part of cultural and natural heritage with outstanding universal value. Additionally, its Article 11.4 established a list of those properties which are in danger.

Unfortunately, the 1972 Convention suffered from several weaknesses, notably its leaning towards monumental properties, sites and landscapes; and its listing of properties based only on their outstanding universal value. From its inception, the 1972 Convention has only designated heritage sites and landscapes all around the world with outstanding cultural values or naturally unique beauty and inscribed them on the World Heritage List. Despite the global efforts and programs of UNESCO, similar-minded international organizations and Members-States, the 1972 Convention for the last three decades has not given priority to the intangible aspect of culture.

This is not to say, however, that the appreciation and the recognition to protect monumental heritage and universally outstanding sites and landscapes began only in

1972 with this UNESCO Convention. To argue so is to denigrate the efforts of well-intentioned predecessors, both from UNESCO and elsewhere.

### *Precursory Efforts of UNESCO, individual countries and communities*

Protection of cultural heritage can be traced as early as the building of the Aswan High Dam in Egypt. The original Aswan Dam, or Aswan Low Dam, was constructed by the British beginning in 1899. The Nile River, the source of water for these dams, normally flooded during the summer and laid to waste whole crops, thus the need to contain it. For several decades, the dam worked well and generated electricity and improved agriculture. The turning point occurred in 1946 when the original dam almost overflowed. It was decided then that there was a high priority to build a second, or high, dam. Unfortunately, building this second dam meant the flooding of an entire area full of cultural treasures such as the Abu Simbel. Archaeologists, with the help of concerned nations, championed the cause of cultural preservation in spite of the enormous costs associated with it. In 1959, rescue operations of the Abu Simbel and 23 other Egyptian monuments began under the auspices of UNESCO. They were either moved to safer locations within Egypt or to other countries that assisted in the preservation efforts.

This UNESCO-initiated safeguarding campaign successfully led the way to other programs in Italy, Pakistan and Indonesia (UNESCO, “*About World Heritage: Brief History*”. Online: <<http://whc.unesco.org/en/169/>>). Of course, nothing can be taken away from the varied efforts of individual countries and communities that have undertaken safeguarding efforts even prior to, or contemporaneous with, these UNESCO’s drives. Thus, the year 1972 can be said to be the culminating point of monumental protection in that the 1972 Convention was adopted.

In 1973, just a year after the adoption of the 1972 Convention, Bolivia – a landlocked country in South America known for its diverse ecological resources, such as natural gas fields, iron and magnesium, whose territory stretch into the Andes mountains and Amazon rainforests, and whose cultural expressions cover folkloric music, baroque craftsmanship and “devil” dances – espoused for the conservation, promotion and dissemination of folklore and oral heritage. Bolivia proposed that a Protocol be added to the Universal Copyright Convention in order to protect folkloric heritage. Though unsuccessful, this move opened the thinking of national and international decision-makers about the long-neglected intangible aspect of heritage.

### *The Antecedents of the 2003 Convention*

After the Bolivian proposal in the early 70’s, not much was done in formalizing the recognition of ICH on the international level. The world at that time was too consumed with regional crises, the global oil crisis, the Cold War, and relative to the heritage field, on listing world heritage sites under the World Heritage List and Endangered List. UNESCO, however, kept at it. In 1982, it established a Committee of Experts on the Safeguarding of Folklore which ultimately led to the Recommendation on the Protection of Traditional Culture and Folklore adopted in 1989 (“1989 Recommendation”). The 1989 Recommendation still had its shortcomings but was nonetheless an exemplar par excellence upon which other succeeding international documents and agreements were based upon. UNESCO also jointly sponsored a conference with the Smithsonian Institution, and initiated projects

on Living Human Treasures and proclaiming Masterpieces of Oral and Intangible Heritage of Humanity. All of these efforts coming from both UNESCO and individual countries apexed into the Convention for the Safeguarding of the Intangible Cultural Heritage in 2003 (“2003 Convention”) approved by the UNESCO General Conference.

### *Challenges of the 2003 Convention*

Three years into its adoption, the 2003 Convention has garnered the signatures of more than enough countries to enter into force in mid-2006. As in any international document, most of which were products of compromises and trade-offs, the 2003 Convention has been hit left and right by critics and academics. Some say that its wordings, particularly on the obligations of States-Parties, are weak and diluted; that obligations were turned into optional recommendations. Others have argued it creates more confusion since the definitions found in the text are incomplete or overly broad. It has also been criticized as reactionary to the 1972 Convention without much meaning on its own. It has similarly been viewed as a mere listing mechanism which was one of the main deficiencies of the 1972 Convention it seeks to correct.

Beyond these critical assessments and semantic indecisions, however, the 2003 Convention is a realization that there has been an ominous neglect on the intangible side of cultural heritage, that further education of the people and primarily the youth is needed, and that torch bearers must continue their propagation and recreation of their ICH. It is corrective, in a way, of the predisposition to associate culture and heritage with monuments, sites and landscapes. It is remedial to the misconception that heritage must always have universal value that is outstanding. The existence of the 2003 Convention continuously probe everyone, practitioner or not, bearer or not, as to the utility of these practices and social processes in the new millennia.

The next few years will be the litmus test for the acceptability and practice of the new Convention carrying time-honored notions of cultural integrity, heritage safeguarding and recreation, education with primacy on the youth, communal ownership and stewardship, and benefit-sharing.

### *National Inventories*

One of the more important provisions of the 2003 Convention, as well as one of its most controversial, is the mandate for all States-Parties to generate national inventories of their respective ICH or Traditional Knowledge (“TK”) (“ICH/TK”). Its intention is to allow the States-Parties to discover and enumerate their ICH/TK and serves as one of the initial steps for their safeguarding. Knowing first what to protect is better than campaigning about the need to protect without any idea at all where to begin. Not surprisingly, this list-generation has provoked insightful commentaries by some anthropologists as to its necessity or practicability, given the evolving nature of ICH-TK. It has also opened serious questions relating to Intellectual Property (“IP”) and its protective regimes.

## *The New Delhi Conference*

Article 3(b) of the 2003 Convention explicitly states that it cannot be interpreted as “affecting the rights and obligations of State Parties deriving from any other international instrument relating to intellectual property rights ... to which they are parties.” This is a tricky situation. It is as if there is a dividing line between ICH-TK on one side and IP on the other. Is there a dichotomy between these two regimes such that they are irreconcilable, utterly polar opposites, and antagonistic by nature? Or is there a room by which they can interface and collaborate with each other? This was the chief goal of the Conference on Intangible Cultural Heritage and Intellectual Property Under the 2003 Convention held in New Delhi (“New Delhi Conference”) on 25-27 March 2007.

Some of the questions that have cropped up are correlated to: (1) the nature, dynamics and functionality of national inventories; (2) who is the holder or owner of ICH-TK; (3) the necessity of prior informed consent of the ICH-TK holders or owners; and (4) whether or not IP protective regimes help, or in fact harm, communities. Related queries are that: considering the volatility of inventories such that no provision has been made to ensure its mandatory access, or how they can be accessed, is the 2003 Convention a tool for further bio-piracy or an instrument for misappropriation?

The New Delhi Conference was specifically held in India due to its long history of traditional knowledge. The venue was also strategic since India is currently developing its Traditional Knowledge Digital Library (“TKDL”) as part of its national inventories, establishing it as a pioneer in the use of IP protection to safeguard its ICH/TK. The TKDL is a tangible expression, so to speak, of the marriage between these two regimes, lending credence to the assertion that they can intersperse quite exultantly.

The New Delhi Conference successfully brought together IP and ICH experts who exchanged and fused their thoughts on IP, TK and TCE vis-à-vis the 2003 Convention. It is envisaged that more conferences and meetings such as this will be held in the future whose work products are idealized to assist the UNESCO, ACCU, States-Parties, governmental instrumentalities, non-government organizations, and community members themselves in the long and arduous quest to safeguard intangible cultural heritage.

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## II. PROCEEDINGS

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### A. Opening of the Conference

The Opening Remarks of the conference were given by Prof. Toshiyuki Kono of Kyushu University, Japan, and by Dr. V. K. Gupta of CSIR, India.

Prof. Kono expressed optimism in the potential of the conference. He noted that other than representing various countries and regions of the world, the speakers were highly-skilled and extremely knowledgeable experts who are committed in the ideals set forth in the 2003 Convention. The speakers – coming from Brazil, Canada, the Netherlands, Switzerland, India, the United Kingdom, and Japan, are either anthropologists, academics, ICH practitioners or country representatives during international conferences. He recalled that as a member of the Japanese delegations in UNESCO-sponsored or similar conferences and experts' meetings, he has encountered many questions and unresolved issues on the relationship and interconnectedness of ICH/TK and intellectual property. With this conference, he hoped that possible solutions or answers to these questions will come to light, which will be beneficial to ICH practitioners and communities, as well as decision-makers in various governments, intergovernmental committees and international organizations.

Prof. Kono was also happy to have decided to hold the conference in New Delhi not only because of the charm of the country and the warmth of the people, but most importantly because of the TKDL project that the speakers and participants will be visiting. Since the issue of national inventories is at hand, the TKDL project is the best exemplification of the workings of such inventories. By witnessing how the project operate, the speakers and participants will be able to bring home to their respective countries and areas of work the values, challenges, struggles and accomplishments of the TKDL. Prof. Kono also thanked his staff for organizing this conference, as well as the CSIR, NISCAIR, TKDL Team, Ministry of Tourism and Culture, and the Indira Gandhi Center of the Arts for participating. Of course, the main sponsor of the conference, the Asia/Pacific Cultural Center for UNESCO (ACCU) was given special mention.

Dr. Gupta pleasantly welcomed everyone to New Delhi and to the conference. In behalf of CSIR and NISCAIR, he is glad that the experts took time off from their respective endeavors to come to India and participate in the conference. He mentioned that ICH is fast becoming an important topic not only for academics but for many people around the world who have been debating and deliberating on this matter. ICH has everything to do with large, developing countries such as India and its communities, particularly because of the breadth of its traditional medicines. ICH safeguarding also stands as a check on misappropriation activities that have been going on for decades. Conferences such as this will certainly bring ICH to the central point of global discussion which will be beneficial to many parties. He, too, stated that the TKDL project, as a model of ICH safeguarding, will be instrumental in the pursuit of other countries of their own national inventories. He thanked everyone for attending.

**B. Keynote Presentation of Prof. Toshiyuki Kono of Kyushu University: “Practice Under the 2003 Convention: Unresolved Issues, Unanswered Questions”**

In his presentation, Prof. Kono expounded on the unresolved issues and unanswered questions that presently hound the implementation of the 2003 Convention. Special attention was placed on the role of the 2003 Convention in the goal of safeguarding the continuous recreation of ICH.

Prof. Kono stated at the onset that he shall focus on the ICH side since he is not an IP expert. ICH is a way of life around the globe, but despite its prevalence, it is in danger of misuse, disuse or abandonment due to the changing social and economic climates. There have been very notable UNESCO-inspired programs aimed at encouraging awareness at the disappearance and abandonment of ICH: the 1989 UNESCO Recommendation but which focused mainly on recording; the 2001 Universal Declaration on Human Diversity which did not center on ICH; among others. Of course, there was the 1972 UNESCO Convention which protected tangible heritage such as monuments, landscapes and sites based on outstanding universal value.

Prof. Kono traced the history of the 2003 Convention by acknowledging the Bolivian proposal in 1973 that raised the issue of protection of ICH (known as folklore during that time). Elaborating on the characteristics of the 2003 Convention, there are two Lists: (1) Representative list; and the (2) List of Endangered ICH. There are also concrete projects to be introduced other than the listing systems in the Convention. The primary organs of the 2003 Convention are the General Assembly of States-Parties and the Intergovernmental Committee (IGC).

Despite being a member of the Japanese delegation which helped draft the text, he found the obligation part rather weak; “shall endeavor” sentences permeate the Convention and there is only one “shall” sentence that is on inventory-making. The language is very unclear and vague despite the many debates, and quoted Rieks Smeets of UNESCO who said that the Convention is “carved in stone and general”. On the positive side, however, community involvement and active consultation with communities have been encapsulated in the text. The need to nurture the younger generation through education was also clearly emphasized. Sustainability and compatibility with human rights were also seen as encompassing hallmarks of the Convention.

Regarding the weakness of the 2003 Convention, a draft Operational Directives is being readied by the IGC in the hope that this can mitigate the vagueness of the text. A Glossary made prior to the drafting of the Convention will soon be made available in order to guide practitioners and governments on the definitions, or limitations, of ICH and related concepts. Despite these efforts, there are those who take the view that the weaknesses persist. In fact, the mandated inventories may be readily commandeered by anyone and used inappropriately.

Prof. Kono also defined the term “Community” which is related to the discussion of the holder issue. Though there might linger the impression that States-Parties have the sole authority over ICH and thus foment disequilibrium of state sovereign power over the communities, this was not the objective of the drafters of

the text. Still, there are questions as to who will represent the communities in case there are no leaders or there is a plenitude of leaders; who will own up to being the sovereign leader? Whether universalism or cultural relativism should prevail in the debate over compatibility with human rights? The reality is that States-Parties will decide first if a national ICH is compatible with human rights or not. However, the IGC may or may not agree with the opinion of the States-Parties, and it is still a question that will certainly be controversial.

ICH is continuously evolving; “freezing” or “archiving” of ICH to a particular point in time or to “fossilize” or “objectify” ICH are the criticisms as to why they should not be documented or recorded into films and other tangible forms. But beyond these criticisms, it is better to have documented or recorded ICH than nothing at all, and museums bearing cultural heritage may inspire the youth to be the future tradition bearers.

Prof. Kono also delved on the purpose and role of the New Delhi Conference, the concepts behind the conference and the interesting momentum now. He closed with the hope that through the presentations of the speakers and the debates or deliberations that will follow, the following questions may be provided with answers: (a) who is the owner of TK-TCE; (b) the importance of prior informed consent; (c) who represents the community; and (d) if the IP protection regime is truly beneficial to the community, or does it rather spoil the efforts of protection by the community?

### Deliberations and Debates

Dr. Van Zanten revealed that UNESCO’s Glossary was made before the text of the Convention was even drafted. This has not gained much use since many have not read the definitions at all. Sadly, the definitions are made by politicians who do not know or understand the issues underlying ICH and its safeguarding. UNESCO should make an effort to complete the Glossary and make it available to the public since it is very much needed now. Prof. Kono agreed that the implementation is highly politicized and will further be politicized in the future. International Conventions cannot be insulated from international or domestic politics. In spite of this, UNESCO should improve the Glossary. Moreover, an Experts Meeting should be organized on the improvements to be done with this Glossary. Indeed, while politicians are in heavy discussion, ICH may die out.

Prof. Mgbeoji commended Prof. Kono for his brilliant overview of 2003 Convention. He stated that the structure of international law is based on states, and that states are not truly free in terms of colonialism. He then asked how does UNESCO pay attention to the individual communities? Prof Kono replied that UNESCO has always placed high importance on the community by analyzing their nuances country by country. It has also done consultative work with non-governmental organizations. In terms of China, its position is that the central government shall be the one to decide what are its ICH and what are the communities themselves. Prof. Mgbeoji further inquired if it is not possible for UNESCO to emphasize more on the peoples and communities rather than on states? Prof. Kono agreed on this point but cautioned that we are not yet at that stage to answer this matter. Presently, individual States-Parties still have the prerogative whether or not to draw up inventories or to choose what ICH should be safeguarded. Indeed, this is a very difficult question to answer. Undeniably, many countries still do not know what

ICH is. To move forward too soon may not be in everyone's best interest. Japan started to recognize ICH as early as 50 years ago, but many countries lag far behind. It is a difficult query to answer but UNESCO is very supportive to all countries.

Dr. Gupta commented that in terms of ownership, there may be a problem when an ICH is claimed to be owned by multiple communities. There can be ICH elements separated into many states within one country. If this is the case, then the State-Party plays a big role. If several countries claim an ICH, then this is an obviously bigger stumbling block. Prof. Kono replied that ICH dispute settlement provisions were decided not to be included in the 2003 Convention as this will be very complicated, and that there was no time left to include it during the debates/deliberations. One dangerous term is "authenticity", such as who is to decide which ICH is authentic and why.

Prof. Oguamanam raised the issue of human rights which he finds very interesting. Cultural relativism is very huge in the entire human rights debate. Would it be possible to say that the 2003 Convention will open the cultural relativism debate again? Prof. Kono replied that even in the selection process of the Masterpieces, there were problematic candidates because of the human rights concerns. As to Prof. Oguamanam's question, this might be answered during the deliberations of the IGC. There will some who will advocate relativism, others will say that the standards set by international human rights documents should be followed. Prof. De Werra asked whether the 2003 Convention requires the public accessibility or not? Prof Kono responded that some communities want their ICH kept as secret or secreted; States-Parties must respect the custom of communities especially about their notions of exclusive access.

Prof. Van Zanten volunteered that he personally does not want a list and inquired whether the body should again open the debate about whether the lists should be existing at all. Prof. Kono insisted that the lists should be there, and that if anyone wants to marginalize the role of the lists, the body should draft recommendations on this on this matter. Not all countries are like India which have both tangible and intangible heritage. These lists put the spotlight on countries which do not have good tangible heritage by emphasizing on intangible heritage.

**C. Keynote Presentation of Dr. V. K. Gupta of CSIR: "India's TKDL: Definition and Classification of ICH and TK in the Context of Inventory Making"** (Note: as per the schedule, the presentation of Dr. Gupta came after the First Session; however, for organizational purposes, it is placed immediately after Prof. Kono's presentation)

In his presentation, Dr. Gupta elaborated on the TKDL project which has been underway in India for the last few years. Special attention was placed on the challenges it encountered and the need to expand the project beyond traditional medicine into traditional cultural expressions.

Dr. Gupta emphasized that Indian Traditional Medicine ("TM") is beneficial to billions of people but are not necessarily tested in the laboratories. It is known the world over and has been in existence for many centuries. He emphasized that there are specific problems of documentation such as how do you identify the owners or

holders? To whom does this knowledge belong if it is thousands of years old? The prevalence of unequal partnership and alliances, for example a village providing TK to Pfizer, may be not work well for the communities. Due to these, the State must safeguard the people and the communities. However, it must be remembered that documentation is a double-edged sword if not taken properly.

TKDL is a project geared toward the prevention of misappropriation of TK. It seeks to break the language barrier and is intended primarily for international patent offices. Wrong patents should not be granted. 2,000 wrong patents are granted every year and India has suffered because of these mistakes. There is a need for a classification system of TK-ICH that is language independent and which is based on IPC (International Patent Classification) that is used by 100 countries. India therefore went to WIPO to say that the IPC classification is insufficient to Indian TK and will thus develop its own classification but still based on IPC. The project was conceived to make its age-old TK understandable to present-day Indians and to the rest of the world. Currently, it has 24 million A4 size pages, is secured so it is not online, and is considered a threat to many multinationals and countries. Developing countries support this project; some developed countries do not.

On the issue of intellectual property rights, they are not sufficient to protect or safeguard TK-ICH as of now. Theoretically, it can safeguard but if one adds all the dollars needed to patent a TK in the more important patent jurisdictions in the world, it will take around 300,000 dollars to protect an Indian Shaman's TK. How can a poor shaman have that money? There is a need, therefore, for TKDL.

### Deliberations and Debates

(Note: again, as per the schedule, the Q & A portion of Dr. Gupta's presentation came after the First Session or just before dinner; it is placed here for organizational purposes)

Dr. Oguamanam disclosed that Dr. Gupta's presentation really hit home regarding the relationship between IP and inventory-making. Most indigenous communities are not jumping into the IP bandwagon; there is a cautious approach. Dr. Gupta agreed. He further pointed out that ICH systems have economic and non-economic values, and that safeguarding can take the form of documentation with the TKDL as an example, or the training of the children. Dr. Oguamanam then asked if it could be said that we should do inventory-making together with the IP rights debate?

Mr. Wendland stated that inventory-making is carved in stone. Documentation of ICH first before a normative framework – this is the question at hand. But inventory making does not force IP to indigenous people, rather it compels people to think about IP issues. He then posited a question: regarding the neem and turmeric cases, they prove that the patent system work but that there was a misstep in the information provided. Can other countries adapt to a TKDL-like system given the costs involved? Copyright arises automatically, there is no examination involved. Dr. Gupta answered that the patent system works. In principle, there is nothing wrong with the patent system. The operational working is the one which has a problem.

Prof. Mgbeoji raised the point that although he teaches patent law, he still has some questions about it as well. Until about 3 years ago, US Patent Office officers cannot search online and do not treat other countries as good sources of knowledge. It is good that India decided to speak the patent language. Other countries should do

the same thing. Prof. Arantes mentioned that he is very impressed with what the TKDL group has been doing and has achieved so far. Oral sources versus written sources will be the next problem to be tackled by India. How does India's TKDL system deal with this dichotomy? Dr. Gupta disclosed that they have started activities on that by deploying field researchers, among other things. Oral knowledge is complex and very difficult to document.

Prof. De Werra raised the issue of the workings of Access Agreements. Dr. Gupta said that the country is the owner of TKDL; it is a national treasure. TKDL does not belong to any individual, it belongs to the state. The TKDL team, during its infancy, went to the Indian cabinet to get its approval on giving access to US, Japan, Europe, etc. because they do not want to be accused of selling one's country. In the end, it worked out well. Prof. Arantes joined in that he agrees that knowledge belongs to the nation. But how about joint benefit sharing with communities? Dr. Gupta said that money earned from TKDL will go back to the discipline.

#### **D. First Session chaired by Prof. Van Zanten (Day One: 25 March 2007)**

##### ***Presentation of Mr. Wend Wendland of WIPO: "Protecting Creativity and Safeguarding Intangible Cultural Heritage: Towards Intellectual Property Guidelines for Recording, Digitizing and Disseminating Intangible Cultural Heritage"***

In his presentation, Mr. Wendland emphasized that safeguarding activities such as inventory making and recording entail varied intellectual property issues. Special attention was placed on how to deal with these IP issues since they tend to be omnipresent, particular on national inventory-making.

As the representative of WIPO, Mr. Wendland stressed that the international organization he represents has, for the last few years, facilitated disclosure mechanisms, programs on safeguarding, and advanced well-intended documentation. These are activities that make indigenous peoples aware of unwanted exploitation and advance their respective interests. Safeguarding is and can be beneficial to many stakeholders involved in the discipline. In fact, coming to the heart of the problem which this conference would like to resolve, there is complementarity of IP issues and ICH safeguarding. They are not isolated, highly polarized concepts.

As we know it, intellectual property is a diverse system of law that encompasses copyrights, trademarks, corporate secrets; IP gives the right of control to the IP holder; it gives them some say on how they can be used. IP has economic dimensions and strong cultural dimensions as well (moral rights for example). It is likewise involved in licensing and the prevention of using a patented matter without prior approval. The Public Domain concerns itself with materials that are not protected under IP law due to expiration of former IP protection or those that cannot be protected at all. In general, intellectual property is intangible; it is the product of human or mental ingenuity or creativity.

It must be realized, however, that IP protection and ICH safeguarding are very different. But IP protection does not undermine ICH safeguarding; they are not in conflict with each other; and WIPO has always stressed on their complementarity. This is evinced with the WIPO Intergovernmental Committee's draft representing a

wide range of experiences and prospectives on ICH safeguarding. This draft has been formulated with indigenous groups as members of the group working. It has been the stern conviction of WIPO that the indigenous perspective is, or should be, at the forefront of this exercise as they are the ones to be affected immensely. Moreover, WIPO has had extensive, direct community involvement in its work, and this will further be discussed in the next session this coming July 2007.

The issue of ICH safeguarding has in its midst serious political, economic and social conflicts. These are matters that cannot be separated in the international dynamics of policy-making or decision-making. In the current TK-TCE debate, economic agenda is present, and for some, it serves as a vehicle for religious expressions.

Going to the particularities of the digitization and documentation project of WIPO, we have set up certain guidelines for managing IP issues when we digitize and disseminate ICH. As stated earlier, there are a hosts of IP issues at every stage of collecting, cataloguing, recording, digitizing, re-issuing and disseminating ICH. Because of the close ties of WIPO with the indigenous, it has been embarking on technological, socio-cultural, political, economic, legal and policy transformations. This initiative has been derived from indigenous peoples and governments from developing countries. These IP-related guidelines and “best practices” mechanisms, WIPO is convinced, could help museums, archives, researchers, government departments, communities and cultural centers to identify IP issues, clarify IP options and develop IP strategies in furtherance of overall safeguarding, education and, where so desired, income-generating activities.

Relative to WIPO’s Creative Heritage Project, it is a survey of existing practices and experiences featuring selected case studies; it also contains searchable databases of existing practices, as well as capacity-building and ICH support for communities who want to digitize their heritage. Presented on WIPO’s webpage on Creative Heritage are ICH experiences of the Masai people, Kenyan people, and other case studies such as Sudanese traditional music.

Inventory-making is, without a doubt, useful for safeguarding matter, but it is an extremely time-consuming endeavor. Nevertheless, inventories are very functional in order to protect ICH. Touching upon related practical issues, current IP practice tends to favor the notion that the “Owner” of ICH is the one who made the recording or took down the notes, and that IP rights vests into the people who make the list or do these recordings, not the persons who are in the picture or who sang the songs. This is where inventories can play a large role: inventories can be used by the indigenous people to safeguard their ICH. Inventories can be utilized as sources of information about beneficiaries or rights holders of the ICH, or where such ICH was derived from. Registration of ICH can act as positive protection for the communities. There can even be joint inventories in response to the “regional folklore” question in case several communities claim an ICH. In case of certain derogatory use of ICH, inventories can be the guide for any researcher or academic that the source of a particular ICH is this community.

Mr. Wendland concluded that IP protection and ICH safeguarding may have distinct objectives, but they are closely-related and can thus be complementary in nature.

### **Presentation of Prof. Antonio Arantes of UNICAMP Brazil: “*ICH inventories in Context: Purpose, Methodology and Functionality*”**

In his presentation, Prof. Arantes emphasized that inventories are starting points of institutional preservation. Special attention was placed on the fact that the 2003 Convention is good for countries which do not have traditionally-acclaimed monuments since the 1972 Convention was too biased for concrete heritage structures.

ICH are not collections of fragments of cultural achievements detachable from the social life and history of those who have created them, but negotiated constructions produced by local social agencies and preservation institutions. It is to be recalled that the institutionalization of culture as heritage is constructed by the ascription of such value to a cultural practice by a living community, and the recognition of such value (validation) by the public authority in a given country.

In Brazil, the law is made such that communities must have the initiative to ask the government to recognize their ICH and thus be placed on the national inventories. Inventories identify and document the cultural heritage of specific social groups, and is therefore crucial for any group to be recognized therein. Once included as part of the national inventory, they shall be considered as having patrimonial value and suitable for protection within the limits of existing legislation.

Inventories provide evidence of prior art. The point of departure of the appreciation of ICH is whether to first: (1) identify a particular cultural practice, its stakeholders and territory; or (2) identify a territory, its population and its culture. Inventories should not cover exclusively the domains established by legislation, but also those indicated by ethnography. However, as anthropologists the world over profess, inventories should not be the official ethnography of a specific tribe or ethnic group. Inventories assist in the perpetuation of ICH but do not circumscribe the boundaries of the heritage of the community or group. They are an instrument of policy, but they should be approved by the communities and written in a language clearly understandable to the community members.

(Presented pictorial and audio representations of Brazilian ICH)

### ***Discussion of Steven Van Uytsel (Kyushu University Research Associate)***

In his presentation, Steven Van Uytsel emphasized that the process of inventory-making is complicated. Special attention was placed on the fact that communities, groups and in certain cases, individuals must be involved in the formation of inventories, but ICH must be seen and recognized in the light of human rights and sustainable development.

Prof. Arantes is correct in saying that there should be community involvement in all aspects of ICH safeguarding, especially in the program of inventory-making. However, the “shall endeavor” provisions weaken the impact of the 2003 Convention.

Inventories should not be an end to itself. Inventories should not be a mere transcription of the available ICH but must have an eye for the broader story. In fact, Articles 11a and 12 (1) of the 2003 Convention, and Articles 2 and 3 of the 2003 Convention is not just about inventory making or listing. To view the 2003 Convention merely as a listing agreement as what was espoused by Michael Brown is to miss the entire point of the text.

Steven Van Uytsel acknowledged that Mr. Wendland correctly mentioned that the 2003 Convention is not a missed opportunity to safeguard ICH and has raised good questions at the end of his paper. The 2003 Convention is a framework treaty, it is shaped in a general way but nonetheless effective. There are few specifications in the text that is why there is a need for the development of the Operational Directives. The 2003 Convention should actually be defended rather than just simply criticized.

### Deliberations and Debates

Dr. Chaudhuri raised the issue of the possible misuse of inventories and asked if inventories involve the scope of the right to performance. Mr. Wendland answered that the right of performance is encompassed, but that it must be said that performance and recording of such performance are different matters. Dr. Chaudhuri commented that even in the absence of a provision on recording, performance right extends to capturing or recording of such performance whether in audio or digital formats. Mr. Wendland added, among others, that assigning property rights on ICH may stifle intercultural exchange.

Prof. Mgbeoji stated, particularly for Mr. Wendland, that indigenous peoples are frustrated about the global community's lack of effort to protect their ICH and correlated rights. He then asked why has it been so difficult on the part of the global community to take seriously indigenous people's ICH rights? The Washington Treaty even took a long time to be ratified. Mr. Wendland responded that the Washington Treaty was negotiated fairly quickly but then it was not ratified nor implemented. He surmised that the longer the negotiation, the better or the higher chance of its ratification by many countries. WIPO negotiations are very complicated; they discuss about time limits, novelty, ownership of ICH, among many details. WIPO is composed of hundreds of delegates, including NGOs. Thus, it takes a longer time to negotiate. The NGOs unfortunately do not necessarily have the support of their governments. Mr. Wendland then said that he fully understands and shares the frustration that Prof. Mgbeoji has mentioned. Regarding the state-centric approach of international law, he gave the example that the African group of the IGC in WIPO said that the right (to determine ICH) belongs to the state, not to the communities or groups. Prof. Mgbeoji mentioned that it was the game industry, the technological companies, that were the ones which relegated the Washington Treaty to disuse. He then posited how can the transformations be made so that they don't defeat the essence of the 2003 Convention? Mr. Wendland recognized that that is the essential challenge. Managing ICH and its transformation into an intellectual property, possibly a marketable economic (not just cultural) good, is a very difficult yet necessary thing to do. He has said that in WIPO, they incorporate the use of fairness, prior consent, among others, to manage these transformations. Regarding the emphasis on guidelines instead of hard law, Mr. Wendland said that soft law is influential already. Soft outcomes are the cornerstone of harder outcomes. Treaties

must pass through experiments to be able to come up with good results. The project he mentioned is complementary to the overall goal of WIPO in terms of ICH.

Prof. Arantes added the information that WIPO has more international NGOs if compared to other international bodies. But as in any international organization, politics are involved in the negotiation process. Many UNESCO members disagreed with the details of the 2003 Convention, such as those related to Glossary. Whether in WIPO, UNESCO or other bodies, it will be impossible to really agree on all things. The 2003 Convention is a good framework treaty; it sets frameworks for important ICH agenda. Despite its good works through the years, however, WIPO has not come up yet with a similar international document. It is high time that it does to properly reflect ICH as living culture. Intellectual property is conventionally all about products created by people through their ingenuity which is not necessarily similar to ICH. Prof. Arantes concluded that he does not think that there is anything wrong that the 2003 Convention is somewhat vague or soft. Steven Van Uytsel noted that the 2003 Convention also have hard law provisions but needs further specification, and that countries can further develop them into their own cultural norm. The 2003 Convention is a framework agreement. To these comments, Prof. Van Zanten opined that no matter how it is viewed, intellectual property is Western-based law.

#### **E. Second Session chaired by Prof. Kono (Day Two: 26 March 2007)**

##### **Presentation of Prof. Ikechi Mgbeoji of Osgood Hall Law School: *“Standing on the Shoulders of the “Other’ed”:* Intellectual Property Rights in Intangible Cultural Heritage and the Persistence of Indigenous Peoples’ texts and inter-texts in a Contextual World”**

In his presentation, Prof. Mgbeoji described the “Other’ed” as the formerly colonized peoples of the world whose worldview, culture and heritage have changed so much due to the influence that the colonials have imposed during the centuries of occupation. Special attention was placed on the notion that the creative process in Western societies is a solitary work and is a generalized and romanticized narrative of the authorial process; contrarily, creativity in modern times is largely a group or collaborative effort.

The issue of ownership and control of ICH is another phase in the resistance and struggle of indigenous and decolonized peoples from political, juridical, cultural and economic self-determination. An analysis of the ramifications and future of ICH without reference to its historical context will not effect a complete picture. The historical reasons as to why some ICH have died or in the process of being abandoned should always be explored if we are to see ICH in a holistic manner.

One of the main issues we grapple presently is the ownership and control of ICH vis-à-vis notions of individual authorship, especially in the context of copyright law. It is generally assumed in contemporary legal systems that copyright is a form of legal protection. But a closer look at copyright reveals that it is but a romanticized notion of individualism and authorship, which leads to the analogy of “Standing on the Shoulders of Giants”.

The analysis of the paper is located within the context of well-known ICE's among the Igbos of southeastern Nigeria using the Third World Approach to International Law ("TWAIL"). To be presented are the various ICH practices of the Igbos people. In this community and in other indigenous communities all over the world, ownership is communal, not individual, contrary to the ideas embodied in copyright.

There is a peculiar vulnerability of ICH to external, especially colonial, cultural influences. ICH are prone particularly to insidious but powerful changes in lifestyle and social values. Stolen or appropriated artworks may be recovered or retrieved, but ICH once lost or altered cannot be restored to their original state. During pre-colonial times, authorship vested to the community. The colonial encounter, however, imbedded the notion that Western civilization was superior to other manifestations of human creativity, insights and civilization – specifically local or indigenous civilization – leading to non-recognition of the cultural attainments of colonized peoples. The supposed cultural superiority of Western colonizers and cultural inferiority of the colonized people were emphasized to the highest degree, and the Civilized Self and the Barbaric "Other" was the main call as to why these inferior people should be taught civilization in the perspective of the West. These colonized civilizations had to be subordinated and, in many cases, destroyed to make way for the suzerainty of Western civilization.

When the colonizers surveyed the vast array and complexity of "other" civilizations, they saw nothing. The Aztec, Maya, Cherokee, Iroquois and Inca civilizations, despite their astute accomplishments, accounted for nothing, and by a stroke of cultural arrogance, the Americas became the "New World". These systematic acts of colonization have been manifested in such concepts as: taming the "Savage"; the infantilization of the colonized people; and Eurocentric notions of authorship. To be regarded as "civilized", the savage had to acquire or internalize Eurocentric norms, values, institutions. But these all overlook an important fact that is similarly often ignored by commentators which is that early copyright law was neither designed to protect the interests of authors nor anchored on the notion of individual authorship.

This was followed by precise descriptions and explanations of importance of the traditions and ceremonies of the Igbos people of southeastern Nigeria including:

- The birth of a child;
- Death or burial ceremonies;
- Coming of age;
- Rituals about the Naval tree;
- Naming ceremony;
- Teething ceremony;
- Cloth wearing ceremony;
- Female rights of passage;
- Fattening ceremonies before a marriage;
- Facial scarification; and others.

**Presentation of Dr. Shubha Chaudhuri of the American Institute for Indian Studies: “Who is the ‘Holder’ of ICH: Revisiting the Definition of ‘Community’ from an ICH Perspective”**

In her presentation, Dr. Chaudhuri presented the “community” perspective from an archivist and pro-active musicologist based in India. Special attention was placed on who the owner of an ICH truly is.

For many decades, Indian archivists and musicologists were working without any law on ICH on Indian music. This has caused division among ICH practitioners and people involved in assisting or organizing them. They have focused mainly on performance right and faith healing. Despite the absence of law or any guiding instrument, they have always espoused that it is the community which owns the ICH and they have the right of performance. Unfortunately, relating to the division even within ICH communities and organizations, this remains an unresolved issue.

Before proceeding to the definition of “community”, who first is the “outsider” from which a community should be protected from? It is good to know what the term “us” means, but it is also significant to know what “them” (meaning outsiders) implies in the community context. “Community” for Indian practitioners is broadly defined to allow flexible application. Dr. Chaudhuri, for reference, reflected on the definitions of communities, groups and individuals as found in the Report of the ACCU/UNESCO 2003 Experts Meeting on Community Involvement. For every caste or village, there would be a peculiar culture and practices within; ceremonies for Gods and Goddesses; shaman practices; and other forms of faith healing. Sadly, the issues of migration, acculturation, and patron-client relationships have redefined ICH practice. Admittedly, this is a part of social change which we cannot control.

One of the after-effects of this redefinition is that informal communities are now slowly being formalized due to competitions or contests, and that communities are using their skills in handicrafts for commercial purposes. This commercialization of native handicrafts do not necessarily benefit ICH.

Dr. Chaudhuri argues that protection should only be granted to community traditions where the sense of ownership exists. If a ritual is sacred and sharing of it is prohibited to the outside world, then certainly this should be protected. But in the larger part of India, there have been a lot of traditional borrowing for musical performances, so this might not necessarily need such protection. However, she pointed out that this does not mean that there is no community identity. There is community identity within the realm of musicians in India. She cautions, too, that there is the looming danger of applying foreign models of protective regimes since they may foist a negative effect by creating artificial boundaries and placing legal tools in the wrong hands.

Individual and community ownership is a very big problem. It is very difficult to give ownership to an individual if it is communally-owned, or to designate ownership to the community if it is copyrighted by an individual, group or corporation. Recently, Bollywood stole a folk song and copyrighted it. These and a host of other problems pose as barriers to the work being done in ICH communities. Two of the solutions that are being implemented are the formation of partnership

between communities and archives, and the promotion of ICH through publication of materials and education.

### *Discussion of Branislav Hazucha (Kyushu University Research Associate)*

In his presentation, Branislav Hazucha emphasized that there should not be too much focus on definitions. Special attention was placed on the need to determine which regulatory regime best fits a certain community.

The ownership of ICH belongs to the community. This says too much but also says nothing. It says nothing about community entitlement to ICH. Thus, ICH practitioners and organizations concerned with ICH safeguarding should not focus too much on definitions. Rather, what should be emphasized are trying to fit regulatory regimes into the communities.

There are different meanings of “communities”. There are sharing of interests, joint actions, and diversity within the community. In this light, each regulatory regime has to be adjusted to each community. It must be determined which of these regulatory regimes can fit best into the varying needs of the communities.

Branislav Hazucha stated that there is no one solution. What can be said, however is to combine regulatory regimes to adjust them to the particular communities. Due to cultural competition, change of habits, and change of culture, it will not be easy to determine which regime will be the most suited for a community.

Why is it important to protect ICH? Because of the existence of cultural diversity. In fact, Nigerian ICH can be compared to European ICH in terms of communal practices and community ownership. European ICH has its own share of practices and social processes that tend to be owned and shared by all of the members of the community.

No one cannot force people to become static. Government-funded activities and projects are needed to ensure that ICH is properly safeguarded. There is a need to preserve people’s uniqueness as represented by these ICH communities all over the world. A so-called one-fit model is not needed; there is no one definition that can accommodate this multicultural world.

### Deliberations and Debates

Prof. Oguamanam asked Prof. Mgbeoji that since he has identified specific stakeholders in the Igbos community in Nigeria and given that they have different yet shared stakes in ICH, what can be a model that will accommodate these various stakes? Is there a framework that can be developed? Prof. Mgbeoji replied that there are different understandings as to how the universe operates, which can vary through time and situations. To find or identify a framework, there is a need to find a system or categorization. More importantly, the world must give credence or legal recognition to these peoples. This is easier in the cases of autonomous or politically independent peoples or countries such as India or Nigeria. But Prof. Mgbeoji is not sure if this is possible for the indigenous peoples in Canada or the United States. Prof. Oguamanam commented that experts cannot be talking about ICH without

going back into customary traditions of states. Customary practices and traditions need not be a discussion that has to take place in Geneva, rather it should be taking place in the communities themselves. There is a need to look backward to the indigenous communities. Anthropological facts must be analyzed. This is an important thought for Mr. Wendland, Prof. Kono and all the others who are part of the negotiations in UNESCO.

Prof. Arantes added that, following the comment of Prof. Oguamanam, it is time that the cultural communities have a voice in the discussion of the implementation of the safeguarding of ICH. The present text of the Convention does not exclude this possibility. Communities should be active participants in the safeguarding process. In this regard, we must define and differentiate process from product. Intellectual property produces a product; ICH safeguards cultural process. In the context of inventories, it must be taken into consideration that there cannot be an exhaustive listing of all ICH, in agreement with the idea interposed by Dr. Chaudhuri. There are symbolic representations which make one group different from the other. The Convention for Biological Diversity (“CBD”) has so much to do with the 2003 Convention. We are not making a mega ethnography of a country; but only a logical framework for each country. This builds a general view of a country’s cultural diversity.

Prof. Kono stated that as of 18 March 2007, the Convention for Protection of Cultural Diversity of UNESCO was enacted. The first General Assembly will be held this coming summer. Mr. Arantes mentioned that the agenda of this first General Assembly should be what is covered by each of the two conventions, what are the overlapping functions or activities allowed and their specific delineations.

Prof. Oguamanam interposed that WIPO deliberations have indigenous peoples as part of the body, which is very good. In 1998-1999, WIPO embarked on a huge study on how communities protected their IP rights which was featured in a previous article of his entitled “Cross Cultural Approach to Cultural Rights”. There are some components of heritage which are not even heritage at all. Customary frameworks must be recognized through legal and anthropological approaches.

Molly Kaushal, an Indian Folklorist working for the Indira Gandhi Center for the Arts asked who are the actual stakeholders of ICH? This is one thing that must be analyzed. She agrees with Dr. Shubha Chaudhuri that unless people are able to revitalize ICH, then peoples and communities lose many things. How can anyone revitalize ICH when the context has already died? One question is whether the product or the process should be protected? Where does protection come in and how shall the ‘owning’ community be identified? In terms of inventory, she agrees to its importance but in the process it may create something like an artificial barrier. She appreciates very much the comments of Prof. Oguamanam. She is convinced that everyone should think globally but act locally.

Prof. Van Zanten raised the issue that lawyers want a straight definition of who are the owners or holders of ICH because they want to know who they should be giving the money to, and who are the other stakeholders. The problem is that a community is not a monolithic block. In a community of 7,500 people, they have different opinions and have complex issues – which he will give more particularity during his presentation tomorrow. He believes that there is a problem with the lists in

the 2003 Convention. If it will just mention a list of activities, then it will be useless.

Prof. De Werra interjected the query as to who decides and what is the decision-making process? How is the decision-making process organized within clans, villages, communities? The older person decides or a formalized voting decides? Prof. Mgbeoji opined that Geneva is a place where there are big hotels, where big politicians meet and make big political decisions but who do not understand the grassroots level. Although he loves Geneva, the lack of understanding of what is happening in the communities is detrimental to the people in these same communities. For example, there are ceremonies that must be done to appease the land in his village in Nigeria. This will not be important to Geneva decision-makers. Grassroots level consultation must be done. Prof. De Werra agrees with this opinion by stating that the bottom-up system is the best approach, even if he himself comes from Geneva.

Dr. Chaudhuri observed that a person can belong to various communities depending on the ICH that is being discussed. There are various levels of ICH. There are no simple answers. Prof. Arantes then indicated his brief comment on the concept of “community”. It is a network of people. The weak point is the lack of reference to the customary way of decision-making. He thinks it is too sociological but lacks reference to the political aspect.

Prof. Oguamanam advocated that “Cultural Communities” is the context of the “C” between “I” and “H” in the term ICH. There must be reference to customary legal practices. There is a need to see what are the political processes involved in decision-making. He again refers to the great WIPO effort he mentioned earlier. UNESCO should do the same. For Mr. Wendland, defining what a “community” is at the international level is impossible. That is why a broad definition of community under the 2003 Convention is most appropriate. He thanked Prof. Oguamanam for mentioning WIPO’s paradigm shift in the late 90s about the project of knowing the communities’ intellectual property rights. Protection means material protection in the safeguarding sense; legal protection which is the IP sense of the word. The 2003 Convention is set apart from IP protection as stated in Article 3 (b) of the text, but as Prof. Oguamanam has stated, the inventory-making mandate in the Convention brings IP into the fold of ICH safeguarding.

Prof. Van Zanten espoused that the “self-ascribed” connectedness is the essence of the definition of “Community” and it is a pity that this is disappeared in the formal text of the Convention. A stepback definition appears on the 2003 Convention. Prof. Arantes agrees with Prof. Van Zanten. The actual definition was what they reached in an experts’ meetings. Self-ascription is imbedded in the network wording. But this is not manifested in the text as was approved.

Dr. Gupta stated that a community cannot be defined in the international level. Only the principles can be defined internationally. What must be done is to start at the grassroots level. Every community has different forms of decision-making. Inventorying must be done with the consent of the community. The community must be empowered. National principles must be attuned with the provincial level and the community level. People should start thinking local. This was echoed by Prof. Arantes who also added that on the issue of process and product, process includes transmission. Transmission includes cultural competence.

## F. Third Session chaired by Dr. Chaudhuri (Day Three: 27 March 2007)

### Presentation of Dr. Graham Dutfield of Queens Mary University of London: “Prior Informed Consent in the IP-ICH Debate”

In his presentation, Dr. Dutfield emphasized that in reality, informed consent is given by governments, not communities. Special attention was placed on the need to respect, preserve and maintain TK, and to promote wider application with approval and involvement of holders. Special emphasis was also made on the International Labour Organization Convention 169 applies, namely “indigenous and tribal peoples in independent countries”.

The debate surrounding bio-piracy and patents is a polarized one. For example, the “discoveries” of turmeric, neem, basmati rice, maca, quinoa, endod, enola bean, ayahuasca, hoodia, and others have enlarged this debate. Are these new and inventive? Or are these old and blindingly obvious ICH that have existed for a long period of time? Hoodia plant extracts is a big business in the United States and the United Kingdom, especially with the prevalence of obesity. But the people who discovered the Hoodia plant have long disappeared. The evidence seems to show that they used the plant as a food supplement and did not even think about obesity since there was no obesity at that time and in their community.

On the issue of prior informed consent, the following are instructive:

(1) *Principles & Guidelines for the Protection of the Heritage of Indigenous Peoples* which states that “**National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples’ heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits**”; and that “**Artists, writers and performers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the traditional owners.**”

(2) *Declaration on the Rights of Indigenous Peoples* which states that indigenous peoples have the “**right to restitution of cultural, intellectual, religious & spiritual property taken without their free and informed consent or in violation of their laws, traditions & customs.**”

Educated prior informed consent “ ... **must be established before any research is undertaken, at individual & collective levels, as determined by community governance structures ... an ongoing process that is based on relationship & maintained throughout all phases of research ... recognises that PIC requires educative process that employs bilingual & intercultural education methods & tools ... also presumes that all directly affected communities will be provided complete information regarding purpose & nature of proposed programme, probable results & implications, including all reasonably foreseeable benefits & risks ... peoples, societies, communities they have right to say no.**”

The approval and involvement of the indigenous are essential. The Conference of the Parties to the Convention on Biological Diversity, 2000, states that **“access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to *prior informed consent* or *prior informed approval* from the holders of such knowledge, innovations and practices.”**

### **Presentation of Prof. Wim van Zanten of Leiden University: “*Prior Informed Consent: Experiences with Ethnomusicological Recordings*”**

In his presentation, Prof. Van Zanten emphasized that Prior Informed Consent (“PIC”) was a good topic since that is what he does: he collects data and bring them up to the highest level of decision-making in the world. Special attention was placed on the Baduy people of Indonesia.

Anthropologist and ethnomusicologist want the data they collect to be “valid”. To be able to do this, there must be a relationship of trust between the data collector and the data provider. For ethnomusicologists, an ethical code for recordings of music in fieldwork exists, A Manual for Documentation, Fieldwork and Preservation for Ethnomusicologist (Society for Ethnomusicology – SEM 2001).

One of the main difficulties of PIC is that it is a long-term commitment. A researcher cannot just go into a community, procure the research and data, leave the area and never come back. That will be wrong and will foment mistrust on the part of the community members. Of course, researchers, anthropologists and ethnomusicologists have to deal with two masters: the people who force them to publish (academic masters) and the people in the communities (community masters). This is a somewhat “Schizophrenic” position. But the bottom line is that these people, the community masters, should be heard.

Academic institutions do not realize that the PIC of a researcher’s respondents has implications, especially as regards audiovisual recordings, far beyond the period of the fieldwork. Again, a researcher cannot just leave and never return after securing his data. There is a long-term commitment that is involved, or should be involved.

The Baduy minority group in West Java, Indonesia, whose ascetic way of life is for the well-being of the world, is the subject of much of Prof. Van Zanten’s research that stretches as far back as the 70’s. His research and recordings with the Baduy covers a period from 1976 to 2003.

At the start, the Baduy leader was pleased with the recordings and enjoyed the visual documentation of Baduy music. This is oral PIC. There are, of course, restrictions relative to rice rituals. In a recorded conversation, the said Baduy leader assented to the dissemination of the recording because outsiders will be able to listen to Baduy music and may even visit Indonesia for that reason. Also, outsiders will never be able to learn Baduy form of music. This contract on tape, constituting a spoken “letter of intent”, is helpful in the discussions about IP rights. At another time, Prof. Van Zanten was filming two Baduy tribesmen when, upon realization that they were being filmed, began to run away. In this case, there is palpably no consent.

The recordings were only meant for documentation; then later on the publishing of a book on Baduy music was conceived and the recordings were placed on CDs and DVDs. All of these were with prior informed consent.

Other than an oral PIC, there is also a written PIC. There are, however, dangers and risks in a written one. Prof. Van Zanten bought a gamelan instrument and then gave it to the head of the village provided that the instrument shall not leave the village. There was a signed written contract on this (that the musical instrument shall not leave the village). But years later, the gamelan was transferred and they have no copy of the written contract. The village leader has already passed away and the children, although having an idea of the gamelan as a gift, were not aware of the written contract.

The last time he visited the Baduy was in 2003 and there were no objections to recordings; it was actually a question of “his” judgment and ethics as to whether he should publicize these recordings or not.

Musicians are interested in transmitting their knowledge. Whether these musicians are community members such as the Baduy people or otherwise, their “technology of enchantment” deserves respect and protection. Certainly, PIC is necessary but it is not the final solution to the problem of IP rights in the field of ethnomusicology; there should be a long-term commitment to the rights of musicians.

#### *Discussion of Prof. Ryu Kojima (Kyushu University Associate Professor)*

In his presentation, Ryu Kojima emphasized on prior informed consent as clearly illustrated by Dr. Duffield and Prof. Van Zanten. Special attention was placed on consent as an embodiment of trust.

Ryu Kojima traced the history of PIC from the doctor-patient relationship. There must be prior informed consent from the patient as to what the doctor shall medically do or perform. In a famous case, a spleen was taken from a patient. The patient consented to the removal. What the patient did not know was that this spleen will be used for further research, which the doctor did. When the patient sued the doctor, court ruled that the spleen was not anymore the property of the patient.

This case and many others represent the many problems associated to PIC. It should be discussed in a broader context. Through the IP lens, the role of trust as stated by Prof. Van Zanten must be deeply explored. This will give meaning of to the term consent. Before one consents, a trust has developed. If there is no mutual trust among the parties, there is very little chance, if any, for consent to be secured.

Ryu Kojima gave his reflections on the wonders of the TKDL project. For him, inventory-making represents trust. But the problem remains as to whom we should give the power of control over TK ownership. He answers this by citing benefit sharing, distribution of royalties, power of controlling information, possibility of compulsory licensing, among others. There is also a possibility of local communities being swallowed by big music industry players in the ethnomusical field. The challenge then for ICH practitioners/ethnomusicological practitioners and IP experts is how to strike a balance between these various stakes and stakeholders.

## Deliberations and Debates

Mr. Wendland started off by saying that he learned a lot from Prof. Van Zanten's presentation. WIPO's focus is the IP dimension and not to intrude into the dynamics of other agencies. There is a need of the perspectives of non-IP people or lawyers into how to go about WIPO's Creative Heritage Project. Prof. Van Zanten's paper was excellent.

Prof. Oguamanam raised the query that when Prof. Van Zanten made a written contract with the Baduy not to take out the instrument outside the community, was this not paternalistic? Did he not give those indigenous people the right to use or not to use the instrument, in or outside the community? Are there any copyright guidelines when approaching indigenous peoples? Prof. Van Zanten responded that Prof. Oguamanam was right since it could be interpreted as paternalistic. But they (the Baduy) could have refused, but they did not. They were free to disagree with the terms of the written contract and he would not have forced the issue. He could easily have given it to the museum in Indonesia. Also, the Baduys do not always agree to anything he says or requests. The Baduys have refused gifts before. He respects the Baduy but he does not respect the Indonesian government's stand on the Baduy.

Prof. Oguamanam then wanted some clarification on the financial reward in Prof. Van Zanten's dealing with the the Baduys, asking if it was PIC or an afterthought of his research process? Prof. Van Zanten replied that of course they are paid a little bit when a researcher records them, as in his case. He felt obliged to give them something. PIC is a long-term commitment so it was not an afterthought. Who is the representative of the Baduy? This is the real problem. We have to go back to the community after securing the needed data or music; that is PIC in its truest essence.

Prof. Kono interposed that today's discussion is helpful to let him think about the future of the 2003 Convention. Regional centers are being put up for the safeguarding of ICH. On the part of Asia, Korea and China are competing for this. But they have no clear idea of what the regional center is all about. Korea intends to put up a recording place using high-tech equipment. He is quite impressed with Dr. Van Zanten's efforts, which dates back to the 70s, when there was still no guidelines whatsoever on ICH safeguarding.

Prof. Arantes elaborated that ICH has a high exchange value. However, because of the differing political mechanisms within a country, indigenous peoples and their interests are usually forgotten. Thus, the lists to be generated under the 2003 Convention are very important since they will give some space of attention for these indigenous groups. But who becomes the administrator of ICH? There must be a Code of Ethics for the 2003 Convention that will set limits on the practice of the Convention. There must also be a forum for local communities where they can appeal. Overall, this is a very productive morning.

Dr. Chaudhuri mentioned that she works in an archive. One time, they got involved with a project of the Smithsonian Institute whereby archives will put up performances on the internet. But the performers agreed to documentation only for research purposes and not for internet publication, so the archive she works for had to go back to them again and seek their PIC.

Pratapanand Jha, one of the Indian participants, revealed that for Indian traditional knowledge, the volume is daunting. It is not an easy task to document. When the indigenous communities sign the agreement, they do not know what they are signing. Traditional peoples do not want to share their knowledge. These people usually do not know anything about protective schemes on their ICH. So there is a problem of how to protect these communities.

Prof. Mgbeoji said that PIC is part of the movement towards recognizing the humanity of the indigenous peoples. They do not ask for money but for recognition and respect. PIC may be procured from the person enslaving the indigenous people playing the instruments, for example. PIC can be an instrument of subordination. There may be no fairness here. To what extent will someone seeking PIC should go if such consent-seeking may in the long run be supporting or encouraging oppression instituted by certain power-wielders?

Dr. Dutfield agreed and said that the main question is who is in charge in communities? The colonizers named the people in charge and appointed chiefs for facility. In this regard, how we can bring human rights in this context? John Locke has good ideas about human rights but he did not apply them to indigenous peoples. This is very tricky and people should be trained about human rights.

Molly Kaushal is convinced that the community is an amorphous mass. Consent by the leaders is the consent of the entire community. The balance of power is tilted especially if money is offered. An Ethical Code is useful, but is not always the answer. There is a Government – Broker – Community relationship or tie in the selling of traditional goods (commercialization). There is a right to cure by a healer, but not the right to reveal the secret ICH. Is this consent? Prof. Van Zanten commented that PIC is the start of a long process.

Dr. Gupta, in reaction to the documentation efforts of India in terms of ICH that is not traditional medicine, said that documentation of oral knowledge has been going on for the last 3 or 4 years. But it is not an open or public project. The Government of India uses PIC in this project. This ICH project will remain undisclosed until there is a sufficient legislation. He admitted that he has not shared this information with any other international forum.

Mr. Balu Subramain of the TKDL Project asked whether India needs PIC for pesticides and insecticides? Dr. Dutfield answered that that is a difficult question. Pesticides and insecticides are different from plant-based medicines. It is good to go back to the communities and ask their consent.

#### **G. Fourth Session chaired by Prof. Arantes (Day Three: 28 March 2007)**

**Presentation of Prof. Jacques de Werra of the University of Geneva: “Does the obligation to disclose the source in patent applications truly help or harm the local communities from an IP perspective?”**

In his presentation, Prof. De Werra emphasized that the obligation to disclose has the potential for being an interdisciplinary matter. Special attention was placed

on the various types of disclosures and if these are truly beneficial to the ICH communities, as well as an assessment of the efficiency of these defensive protection measures.

Prof. De Werra first defined the obligation to disclose which is the disclosure of the source and country of origin, and the mandatory presentation of evidence of PIC. He mentioned that in the fight against biopiracy, there have been attempts to require patent applicants to disclose both the actual source and country of origin of such resources, as well as proof that prior informed consent was obtained. Full disclosure implies PIC and Access-Benefit Sharing schemes, while partial disclosure connotes disclosure of source only, no PIC, no mention of beneficiaries.

He argued that the obligation to disclose may not necessarily allow benefit sharing. The goal is to create transparency, particularly during the time of patent application. PIC greatly enhances and contributes to this goal, but is only a step into that direction.

There are, of course, sanctions to violations of this disclosure obligation. Some of which are outside patent law, i.e. criminal or civil penalties, but the validity of the patent is not affected. Some are within patent law, i.e. the cancellation of the patent, but this does not totally help a community. These sanctions serve as deterrence but there are limits to such deterring effect. Prof. De Werra maintains that although the obligation to disclose may serve as a possible bar to biopiracy, it may still prove insufficient in many cases.

Recently, there has been a paradigm shift from the traditionally defensive, punitive approach to proactive, value-creating approach. This is a welcomed development for the communities and ICH practitioners. There must also be transparency on benefit sharing with lessons to be learned from tangible cultural property laws such as the UNIDROIT Convention.

There are many modalities for ensuring benefit sharing. Co-ownership is one of them but it is not a perfect model. Compulsory licensing is another which deals with monetary and non-monetary benefit sharing. The enforcement of benefit sharing entails a stay of the patent application. But this brings about the question of access to justice. Prof. De Werra opines that the litigation costs that a community will have to bear will truly be a big burden on its part and shall serve as a big deterrence itself to rights protection.

Prof. De Werra concluded that intellectual property rights is not a final end in itself; it is not sufficient by itself. It helps the communities but not necessarily enough. What the world faces now is a global issue, thus a global solution is needed and inter-disciplinarity is critical.

**Presentation of Prof. Chidi Oguamanam of Dalhousie Law School:  
“Documentation/Digitalization of Traditional Knowledge and Intangible Cultural  
Heritage: Prospects and Challenges”**

In his presentation, Prof. Oguamanam emphasized on the prospects of the documentation and digitalization of traditional knowledge presently being done by

States-Parties to the 2003 Convention. Special attention was placed on whether or not documentation and digitalization of TK and ICH truly help protect the indigenous communities.

Prof. Oguamanam points to the difficulty of reconciling TK-ICH with the Western IP system, or vice versa. This comes with the backdrop of a genetic resources momentum wherein the environment, specifically plants, animals, other biological/ecological resources, are the main global interests. He counsels that Western forms of intellectual property rights, universalized for global application by the TRIPS Agreement, cannot accommodate TK-ICH in its diverse manifestations. This leads towards the road for a *sui generis* regime of IP.

He states that while documentation creates more awareness, it has increased its potential for access to TK “by entrenching it in a far more overtly unenclosed manner as part of the public domain,” like a failed vaccine. Documentation, as one of its evils, may facilitate not only easier access by patent examiners but also an unperturbed access by biopirates.

Prof. Oguamanam thinks that a *Romance* of the commons is something to be cautious about since it makes ICH vulnerable. Although documentation assists in the perpetuation and safeguarding of ICH, it can also result to global exposure and illegal knowledge transfer. He concludes that there must be a regional approach to TK and ICH documentation. Digitalization will allow the holders to build upon past recreations of their ICH. It is a response to biopiracy and unfair patent practices. However, it is a potentially divisive issue because of the stakeholders’ lack of uniform motivation.

The other significant points are:

- Post-TRIPS period: the search for a new IP or knowledge protection order
- Bio-revolution is a focus on biological diversity in view of phenomenal scientific advancements; there is a present burgeoning of biotechnology which is intertwined with computer-driven digital revolution
- Bio technology and digital technology are protected by conventional IPRs
- The CBD displays some sensitivity for TK-ICH, even if its approach to TK is rooted in the market economy model; the CBD provides for ABS and PIC
- The CBD provides an impetus for the recognition of indigenous communities’ claims for equitable distribution of the benefits of genetic resources
- There was a Swiss initiative during the reform of the Patent Cooperation Treaty aimed at promoting ABS transparency and the traceability of third party deployment of TK-ICH
- Developing countries have sought for the amendment to the TRIPS Agreement on disclosure of source of origin of genetic resources and associated TK-ICH
- The European Commission has supported the implementation of the CBD provisions on ABS over genetic resources; but they are unwilling to impose a disclosure obligation on patent applicants except regarding the sources of origin that are clearly known to them. With this, patent applicants can feign ignorance;
- WIPO’s IGC-GRTRF is a part of the revitalization of the international legal framework for TK-ICH protection; it was set up to explore issues on ABS, TK protection, among others, and it supports an anti-appropriation initiative;

- WIPO's stance is that "defensive protection refers to strategies that emphasize the prevention of acquisition of intellectual properties over TK by second comers or strangers to the knowledge or resources"
- Duke Law Professor Jerome Reichman's Theory of compensatory liability for the stimulation of TK. The theory is that TK is not reconcilable with conventional IPRs due to: (1) limited term extension of TK protection within which to restrict market encroachment by 3<sup>rd</sup> parties on the products of local knowledge; (2) TK owners are guaranteed entitlement to compensation from second comers who improve upon the former's local knowledge; (3) TK owners have the right of access too improvements on their knowledge by external parties; TK and genetic resources are placed in a "semi-commons pool";
- But this theory was contradicted through Arrezo's criticism of the compensatory liability theory in that it undermines the sovereign right of countries; that there are practical challenges regarding the feasibility of its co-existence with TRIPS-driven conventional IPRs; and that knowledge can be brought from the semi-commons pool and locked in through IPRs. According to this criticism, the model is not viable.

### *Discussion of Carlo Osi (Kyushu University Research Associate)*

In his presentation, Carlo Osi emphasized on the notion that ICH and intellectual property are not polar opposite fields but are actually complementary and mutually-intersecting. Special attention was placed on the chief points of Prof. De Werra and Prof. Oguamanam which centered on what are the most feasible forms of protection to ensure that ICH and TK remain constantly recreated, and if IP, as a dominant protective regime, truly help – or in fact harm – traditional communities.

Traditional knowledge is defined by the spirituality of the indigenous peoples. Every tree, every river, every creation has a spirit. Such practices may seem strange to outsiders, but they are native and commonplace to these people. Once regarded simply as mountain people or highlanders, indigenous people have recently been regarded with more respect and appreciation. Ultimately, their culture must be protected and their heritage devoutly safeguarded.

Carlo Osi emphasized the main points of both Prof. De Werra and Prof. Oguamanam as elaborated in their papers, agreeing with almost all of the critical points they raised. They provided excellent ideas and reflections on what can truly be helpful for the communities. It can be seen that disclosure of the source of origin has a deterring effect but may not necessarily be able to protect community interest. In a co-ownership model, the community is still the dominated entity and will not be able to stand toe to toe with institutional stakeholders. The community will be a weaker entity; it will be very difficult for it to determine if everything in the partnership relationship is fair and above board, or if their interests are already been sacrificed. In case of litigation, the community will find itself at a disadvantage. Their corporate partners will be able to hire powerful law firms and engage in various modes of dilatory and similar schemes to frustrate their causes of action. Carlo Osi also stated that non-disclosure, partial disclosure or false disclosure may have ramifications in the application process or on the applicant itself, but it will not necessarily secure the intangible heritage nor permit the communities from benefiting. Regarding a digital library, it will be difficult for his country (the Philippines), given its economic and political problems, to come up with a TKDL-like program for its TK documentation.

The advantages of documentations, such inventory-making, far outweigh its disadvantages. Beyond freezing ICH to abusing the "commons", the benefits of

documenting ICH are manifest. This is in agreement with the position of Prof. Oguamanam. They can signify the endangerment of a social process, the threat of industrialization or globalization, the need for new tradition bearers, *inter alia*. They can serve as a spine by which future practitioners can build on in their quest to constantly recreate and reconstruct their ICH. Like a blueprint, a documented ICH can act as a roadmap for future generations. Does IP protection truly help or harm local communities? Well-managed and well-intentioned IP protective measures can in fact help local communities in recognizing and safeguarding their ICH.

### Deliberations and Debates

Prof. De Werra initiated the deliberations by clarifying that the co-owners are in an unequal balance of power. The co-ownership model he discussed has its weaknesses, which is primarily that the co-owners are not in level playing field. The corporate entity will have superior resources than the co-owner community. Prof. Oguamanam stated that what he meant about documentation being promoted mainly by nation states and communities of the global South is that indigenous communities, whether found in developing countries or those situated within the territories of Western powers, are advocating documentation to preserve and safeguard their ICH. Such advocacy is not limited to purely developing nations. An example would be the Navajo Indian whose rituals are expressions of their distinct culture – they are found in North America, a part of the developed world, but they still adhere to documentation.

Prof. Mgbeoji then asked Prof. Oguamanam what is his conclusion since he mentioned about regional approach as a solution and how will politics come into play? Prof. Oguamanam replied that his position is in consonance with what Prof. Mgbeoji wrote about the Liberian crisis (Prof. Oguamanam reviewed the book). Prof. Oguamanam stressed that Prof. Mgbeoji was writing about a roadmap about how to unite the Liberia. Prof. Oguamanam elucidated that he particularly articulated the issue of knowledge as the unification of colonized people. He also utilized the “Salt water” doctrine that illustrates the relationship between colonized states and their European colonizers. He added that there is a culture of suspicion within the liberalized world. However, on the issue of ICH, people have opened their eyes about traditional knowledge. It is interesting that in WIPO, the uniting force is knowledge.

Dr. Gupta interjected and said that he fully supports the ideas of “Dr. Chidi” (Oguamanam). Under the SAR project, the Government of India is doing a project on TKDL Pakistan. This is a very good example of regionalism. It will just take 90,000 US dollars for a country to develop its own TKDL. It is just half a million dollars which we have expended for TKDL so it is not necessarily true that a country like the Philippines cannot put up its own TKDL. TK is being created today for tomorrow. TKDL is a dynamic project, not static in any way. India is also exploring the compensatory liability model.

Prof. Kono asked a question to Dr. Gupta that has reference to the visit of the conference speakers to the TKDL facility the previous day. A lady in TKDL showed him a 1,000 year old book. How can the project technologically transcribe this into TKDL? Dr. Gupta answered that there are many steps to make sure that the actual knowledge in the old Indian books are transcribed properly into the TKDL system. After inputting, the data is checked by a senior reader or researcher. There are

various steps to ensure accuracy. They also intend to help other countries for as long as they are willing. The maximum is 100,000 US dollars for a TKDL project.

Mr. Wendland raised the issue that the body is talking on the general level about ICH documentation. But this body also needs to specify IP protection. There are four (4) questions that this body needs to ask, which are “how, what, by whom and to whom” relative to ICH safeguarding. What is being documented? From a legal analytical point of view, if you are documenting ICH, there are different implications on intellectual property. To whom does the inventory is being made for? In a public register? In a database? These are the important questions. Prof. De Werra connected the thoughts of Mr. Wendland to his by stating that the conference body should see these four questions in a chronological perspective involving two steps – making the inventory; and the expectations from the inventory (accessibility; open to the public, *inter alia*). There are many views on this matter.

Prof. Oguamanam directed his query to Mr. Wendland stating, “Wend, you have decoded for us how we can begin to navigate the IP-ICH relations. Each of these four questions will reveal that there is a strong relationship between IP and ICH. One might strengthen the other. Under these four (4) headings, we can discuss the necessary IP protection.”

*(This formally ended the fourth and last session. The exchange below, which occurred after a break, is the open forum for all of the speakers on any of the topics previously discussed in any of the four sessions, or other related matters that needed attention.)*

## **H. Open Forum**

Prof. Mgbeoji asked the body if it is possible to have a legal regime where the burden is on the person who has the patent? Prof. De Werra replied that, coming from Switzerland, they do not have such a presumption. Under their Civil Procedure, the burden is on the person who wants to show that something exists or something is wrong. The burden is on the communities. One approach is to reverse that presumption. However, he cautions that he is not sure if this will be acceptable at the international level.

Prof. Arantes remarked that he wanted to ask a question to Dr. Gupta but the latter has just left (Dr. Gupta left the conference before the start of the Open Forum to attend to important governmental affairs). Prof. Arantes said that the colleagues of Dr. Gupta can answer this question well. He then narrates that the effectiveness of the healing process depends on the healer. Healing is a ritual and has something to do with mythology. From an anthropological point of view, the division between material and immaterial is not accurate. “What are your thoughts about this?” Mr. Balu Subramain of NISCAIR-CSIR responded that, “[W]e are working on the codified version of traditional medicine as of now. Of course, we have not covered everything. The information existing in the text (books) is what we are doing right now. Regarding yoga, we shall be embarking on that very soon. We shall document ICH through videos.”

Prof. Arantes followed this up by saying that he wanted to bring Dr. Van Zanten into this discussion. “Who are the legitimate people who should be at the frontline of the transmission process? What do you ... can you make a comment on that?” Prof. Van Zanten rejoined that transmitters want transmission to be done in a proper way. One cannot do it in a superficial way if one wants to be taken seriously. This is a question of transmitting in a proper way. If they are confident that this is being done properly, then the communities will share more. Maybe Shubha (Dr. Chaudhuri) has additional comments since archives may have more information on this matter.

Dr. Chaudhuri stated that there is a huge amount of oral law in the healing regime. This is not getting into a database that is based on written text. Regarding the transmission of music, there is a lot of ritual when a disciple is accepted but the principles are being diluted. Some teachers will not pass on knowledge unless the pupil is certainly committed to the art. This may take a long time, even years. Some pupils have been living with their teachers for four years and have not been taught anything.

Prof. Mgbeoji asked, “[W]hat is the role of place or location in archiving? And how is it a problem?” Prof. Van Zanten replied that “[P]lace and time are very important in anthropology. The whole rights system in India is dependent on time. The same thing with place. But we should not exaggerate this, however, as times are changing. They are very important, yes. We should not, however, also forget that things are changing. It takes a long time to give information before, now it is easy to learn Indian music, say in 40 days. (Dr. Chaudhuri confirmed that this is happening in India). Things are moving. Teachers must adapt to the situation. It easy to change in an urban setting. The Baduy people, for example, wants to keep themselves pure. They are forecasters of the future and even Suharto believed and consulted them. I must clarify though the Baduy does not and did not object to my making and performing Angklung music.

Prof. Arantes agreed that place is very important. This is what anthropologists like himself were discussing in Brazil. Place highlights the intangible aspect of a given territory. This is exemplified when moving a people who planted a tree in the middle of an important area. This place is so important to this people that the government decided to leave this place alone.

Dr. Chaudhuri mentioned that India has a problem with places of certain people because they are known or designated as sacred areas. Sometimes, the sacred places are temporary so these create a problem for anthropologists and the government alike. Some places are sacred only for a particular event or occurrence, and loses its importance or sacredness once that time passes. Even the backyards of homes are used as sacred places. This makes it difficult to record. Prof. Van Zanten chimed in that there are also spirits of the earth which belong to specific places. Human beings are not the only audience during performances but also other Beings. This makes it very complicated.

Prof. Kono then stated, “I would like to raise one point. Three weeks ago, I served as a jury member in the selection of good practices for ICH. There are many interesting examples. But one example was a traditional dance in the southern part of Japan, specifically in Okinawa island. Somebody taught local boys this dance and the

circle became bigger and bigger. More and more people are participating. They even put up an association within Japan and this practice may even be exported abroad. Is this a specific ‘community’ itself? For the purpose of safeguarding the ICH? Just food for thought.”

Prof. Arantes, in closing the Open Forum, then asked if there are other comments, opinions or questions. There was no other comment or opinion so he turned over the floor to Prof. Kono for other issues.

Prof. Kono asked the body how to make the outcome of this conference public considering the important points raised and debated herewith. He identified two options for publication, one is the Journal for World Intellectual Property (“JWIP”) and the other is a book publication possibly through Ashgate Publishing. A book will be purchased by libraries around the world and it will survive longer, but it will be more expensive to produce. JWIP is a very excellent resource material as well. So both are very acceptable. It must be borne in mind though that book or journal reviewers may want to change some things in the papers or recommend alterations, or not to accept some papers at all. This is the risk. Prof. Kono opened the floor as to what the speakers would like to pursue.

It was collectively decided by the body, after much deliberations from Dr. Dutfield (a very renowned writer on intellectual property and TK who has published numerous books and journal articles), Prof. Kono, Prof. Arantes, Mr. Wendland, Dr. Chaudhuri, Prof. de Werra, Prof. Oguamanam and Prof. Mgbeoji, to publish a book through the United Nations University publication based in Tokyo, Japan, or through other publications such as Earthscan (based in London and which Dr. Dutfield described as a publishing house which produces excellent yet not so expensive books).

The proposed book was decided to be accompanied by a CD or DVD which contains, among others, audio-visual presentations presented during the conference, abstracts of the papers, and transcripts (or report) of the conference. Dr. Mgbeoji mentioned that since publishers want the contributors to have read the other contributions, there is a need for cross-references of the articles. Prof. Kono added that this book must be published very soon; if not, the information found in the papers will be outdated. He also asked the body (which was approved) if he can invite an IP lawyer, Ms. Terri Janke, to contribute an article.

The speakers decided that 15 April 2007 shall be the deadline for the abstracts of the papers, while 31 May 2007 shall be deadline of the revised versions of the conference papers. It was also proposed that these revised papers be available online, if possible.

## **I. Closing**

Closing remarks by Prof. Toshiyuki Kono of Kyushu University, Japan:

“I am very happy that I, with the help of ACCU, CSIR, and my staff, organized this conference with you as speakers. I know that the publications will be well received in many parts of the world.

We hope you can in stay in touch with us. ACCU might contact you directly for many meetings and conferences in the Asian region and beyond. Thank you very much for being here. This conference would not have been, as it is, a huge success without your active participation. In behalf of the sponsors, ACCU based in Tokyo, Japan, CSIR of India, and Kyushu University of Japan, thank you once again.”

### **III. TKDL Visit**

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The visit to the TKDL facility on 26 March 2007 was organized by Dr. V. K. Gupta through the TKDL team. It allowed the international speakers to see for themselves the workings of a national inventory of Indian traditional medicine. The specific mechanics as to how to organize an inventory was discussed individually to the speakers, how the TKDL is linked to international patent standards, how a patent examiner from the United States for instance can check the prior existence of a medicine in the inventory of the Government of India through the TKDL, and others.

It was truly a very educational and eye-opening visit since it was documentation and digitalization before one’s eyes. The speakers were able to raise their questions to the TKDL officers and staff members, such as the dangers of documentation, the benefits of the programs, and the challenges to the inventorying of Indian ICH.

It was one of the highlights of the conference.

### **IV. CONCLUSION / OUTCOMES**

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As stated by Prof. Kono, the Conference on Intangible Cultural Heritage and Intellectual Property Under the 2003 Convention was a resounding success. The ideas, thoughts, suggestions and comments from all of the participants all worked towards building enhanced perspectives on ICH, TK, intellectual property, and their interrelationships.

The book project that shall soon be underway will document these ideas, thoughts, suggestions and insightful comments.

**Annexes:****Annex A:****List of Participants**

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**List of Speakers / Discussants**

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De Werra, Jacques	University of Geneva (Switzerland) School of Law	Jacques.DeWerra@droit.unige.ch
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## Annex B: Conference Schedule

### New Delhi Conference Schedule

23 March 2007	: Arrival
24 March 2007	: Individual Day
25-27 March 2007	: Conference proper with visit to the TKDL project area
28 March 2007	: Departure from New Delhi

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#### SCHEDULE OF CONFERENCE PROPER

##### **25 March 2007 : First Conference Day**

*Breakfast and Lunch*

**Opening Remarks** 1:00 – 1:15 pm

by **Prof. Toshiyuki Kono** and **Dr. V. K. Gupta**

**Prof. Toshiyuki Kono** 1:15 – 2:00 pm  
“Practice Under the 2003 Convention: Unresolved Issues, Unanswered Questions”  
Q & A 2:00 – 2:30 pm

*Session 1: To be chaired by Dr. Wim van Zanten*

**Mr. Wend Wendland** 2:30 – 3:15 pm  
“Protecting Creativity and Safeguarding Intangible Cultural Heritage: Towards Intellectual Property Guidelines for Recording, Digitizing and Disseminating Intangible Cultural Heritage”

**Prof. Antonio Arantes** 3:15 – 4:00 pm  
“ICH inventories in Context: Purpose, Methodology and Functionality”

*Discussant:* 4:00 – 4:15 pm  
**Steven van Uytsel**, Kyushu University Research Associate

*Break* 4:15 – 4:30 pm

Session Q & A 4:30 – 5:00 pm

**Dr. Vinod Kumar Gupta** 5:00 – 5:45 pm  
“India’s TKDL: Definition and Classification of ICH and TK in the Context of Inventory Making”  
Q & A 5:45 – 6:15 pm

*Dinner* 7:00 pm

##### **26 March 2007 : Second Conference Day**

*Breakfast*

*Session 2: To be chaired by Prof. Toshiyuki Kono*

**Prof. Ikechi Mgbeoji** 9:30 – 10:15 am  
“Standing on the Shoulders of the ‘Other’ed”: Intellectual Property Rights in Intangible Cultural Heritage and the Persistence of Indigenous Peoples’ texts and inter-texts in a Contextual World”

*Break* 10:15 – 10:30 am

**Dr. Shubha Chaudhuri** 10:30 – 11:15 am  
“Who is the ‘Holder’ of ICH: Revisiting the Definition of ‘Community’ from an ICH Perspective”

*Discussant:* 11:15 – 11:30 am  
**Branislav Hazucha**, Kyushu University Research Associate

Session Q & A 11:30 – 12:00 noon

*Lunch*

**Visit to the TKDL project area** 1:30 – 5:30 pm  
\*with an “Introduction to the TKDL” by *Dr. V. K. Gupta*

*Dinner* 7:00 pm

### **27 March 2007 : Third Conference Day**

*Breakfast*

*Session 3: To be chaired by Dr. Shubha Chaudhuri*

**Dr. Graham Dutfield** 9:30 – 10:15 am  
“Prior Informed Consent in the IP-ICH Debate”

*Break* 10:15 – 10:30 am

**Prof. Wim van Zanten** 10:30 – 11:15 am  
“Prior Informed Consent: Experiences with Ethnomusicological Recordings”

*Discussant:* 11:15 – 11:30 am  
**Ryu Kojima**, Kyushu University IP Professor

Session Q & A 11:30 – 12:00 noon

*Lunch*

*Session 4: To be chaired by Prof. Antonio Arantes*

**Prof. Jacques de Werra** 1:30 – 2:15 pm  
“Does the obligation to disclose the source in patent applications truly help or harm the local communities from an IP perspective?”

**Prof. Chidi Oguamanam** 2:15 – 3:00 pm  
“Documentation/Digitalization of Traditional Knowledge and Intangible Cultural Heritage: Prospects and Challenges”

*Discussant:* 3:00 – 3:15 pm  
**Carlo Osi**, Kyushu University Research Associate

Session Q & A 3:15 – 3:45 pm

*Break* 3:45 – 4:00 pm

**Open Forum for All Speakers** 4:00 – 5:00 pm

**Closing Remarks**  
by **Prof. Toshiyuki Kono** 5:00 pm

*Dinner* 7:00 pm

## Annex C-1: Selected Conference Pictures



Prof. Toshiyuki Kono (Kyushu University, Japan)



Prof. Antonio Arantes (UNICAMP, Brazil)



Prof. Jacques de Werra (University of Geneva, Switzerland)



Dr. V. K. Gupta (CSIR, India)



Mr. Wend Wendland (WIPO, Switzerland)



Prof. Ikechi Mgbeoji (Osgoode Hall Law School, Canada)



Dr. Shubha Chaudhuri (American Institute of Indian Studies, India)



Prof. Chidi Oguamanam (Dalhousie Law School, Canada)



Prof. Wim van Zanten (Leiden University, The Netherlands)



Prof. Graham Dutfield (Leeds University, United Kingdom)



Group pictures at the Maidens Hotel, New Delhi, India



**Annex C-2: Selected TKDL Visit Pictures (TKDL Facility, New Delhi, India)**



Prof. Toshiyuki Kono and the TKDL staff



Prof. Chidi Oguamanam and the TKDL staff



Prof. Jacques de Werra and the TKDL staff



WIPO's Wend Wendland and the TKDL staff